

# Exhibit D

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**From:** Kaufman, Noah J. <noah.kaufman@morganlewis.com>  
**Sent:** Wednesday, May 5, 2021 10:30 AM  
**To:** Albert, Bradley Scott; Black, Armine; Mahoney, Stacey Anne; Wilbur, Sarah E. Hsu; Castaneda, Michelle M.; Cravens, William S.D.  
**Cc:** Casey, Christopher H.; Rudowitz, Andrew J.; sckulik@duanemorris.com; Nicholas A. Rendino; Kevin J. Arquit; Kenneth R. David; Anthony MacDonald Caputo; David Gardy Ermann; Christina Lewis; Michael.Goldsmith@doj.ca.gov; Laura.Namba@doj.ca.gov; RSchultz@atg.state.il.us; jeremy.kasha@ag.ny.gov; saami.zain@ag.ny.gov; arlene.leventhal@ag.ny.gov; ksturgis@ncdoj.gov; Jsutton2@ncdoj.gov; beth.finnerty@ohioattorneygeneral.gov; Liz.Maag@ohioattorneygeneral.gov; Patrice.Fatig@ohioattorneygeneral.gov; jketsko@attorneygeneral.gov; sscannell@attorneygeneral.gov; SOAllen@oag.state.va.us; thenry@oag.state.va.us; Meier, Markus H.; Schmidt, J. Maren; Perlman, Neal; Flint, Phoebe; Tuttle, Bryce; Reed, Steven A.; Stempel, Scott A.  
**Subject:** RE: Defendants Disclosure of Expert Witnesses  
**Attachments:** Feb. 12 Deadline re: Expert Disclosure

Brad,

I am attaching your email of February 11, 2021 memorializing the parties' agreement as to the import of the Court's September 11, 2020 scheduling order, and in particular the February 12, 2021 deadline for the "[d]isclosure of identity of Experts providing an opening Expert report." Your email expressly acknowledged that "Defendants have no obligation to disclose or file opening reports for all issues on which Defendants do not bear the initial burden – specifically . . . ***the calculation of equitable monetary relief.***" (emphasis added). Our disclosure of Mr. McLean as an expert to testify as to the companies' inability to pay a judgment is directly relevant to the Court's calculation and award of equitable monetary relief, and thus falls squarely within the subjects that we agreed were subject to disclosure in April, not February.

Your email also makes clear our agreement that the February 12 deadline pertained only to issues on which a party "bears the initial burden of proof." The company defendants do not bear an initial burden of proof as to their ability or inability to pay a judgment. Rather, by proffering an estimate of ill-gotten gains in Professor Hemphill's report that exceeds the companies' ability to pay, Plaintiffs put the issue of ability to pay into play, and necessitated our disclosure of Mr. McLean as a rebuttal expert witness. To illustrate the point, if Professor Hemphill had proffered an estimate of ill-gotten gains that was not beyond the companies' ability to pay, the companies would have had no need for an ability to pay expert.

The timing of our disclosure of Mr. McLean as an expert witness is not only in line with our express agreement, but it also has no potential to prejudice the Plaintiffs, and your email below does not suggest otherwise. Plaintiffs have already seen the substance of Mr. McLean's opinion and, in fact, asked us if we would be offering Mr. McLean as an expert in this case. We confirmed that we might, so our disclosure of Mr. McLean should not come as a surprise. Plaintiffs are free to identify—by the June 8 deadline to do so—the identity of an expert (or experts) who will offer a reply report to rebut Mr. McLean's opinion.

We are available to meet and confer during the windows that you identified on Friday.

Noah

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**From:** Albert, Bradley Scott <BALBERT@ftc.gov>

**Sent:** Tuesday, May 04, 2021 12:16 PM

**To:** Kaufman, Noah J. <noah.kaufman@morganlewis.com>; Black, Armine <ablack1@ftc.gov>; Mahoney, Stacey Anne <stacey.mahoney@morganlewis.com>; Wilbur, Sarah E. Hsu <sarah.wilbur@morganlewis.com>; Castaneda, Michelle M. <michelle.castaneda@morganlewis.com>; Cravens, William S.D. <william.cravens@morganlewis.com>

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**Subject:** Defendants Disclosure of Expert Witnesses

[EXTERNAL EMAIL]

Counsel -

We object to Defendants' identification of Justin McLean as a "rebuttal" expert.

Mr. McLean is not a rebuttal expert. By Defendants' own disclosure, he is not responding to any opinions offered by Plaintiffs' experts. For example, the disclosure does not suggest that Mr. McLean is responding to Professor Hemphill's calculation of Vyera's ill-gotten gains. Instead, Mr. McLean's opinion is limited to the "financial condition" of the Corporate Defendants and whether these entities have the ability to "pay a judgment while remaining a going concern." To the extent Vyera's ability to pay a judgment has any relevance to this case, it is only because Defendants have raised it; this issue is not an element of Plaintiffs' case. Accordingly, Defendants bear the burden of proof, and were required to identify Mr. McLean on February 12, 2021—the date for disclosure of experts providing opening reports.

We intend to move to strike Mr. McLean as an expert. Please let us know when you are available for a meet and confer. We are available Wednesday after 3:00pm, or Friday (except between 11:00-12:00 and 3:30 and 5:00).

Brad

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